A

ABD RAZAK ATAN

v.

DATO' AHMAD RAGIB MOHD SALLEH & ORS

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
T SELVENTHIRANATHAN JCA
[CIVIL APPEAL NO: W-01-72-2002]

C

8 JANUARY 2010

CONSTITUTIONAL LAW: *Public servants - Dismissal - Procedural fairness - Opportunity of being heard - Whether written representations satisfy demands of natural justice - Whether oral hearing obligatory -*

D

Whether disciplinary authority must appoint committee of inquiry - Whether disciplinary authority has full discretion to decide if it needs 'further clarification' - Sufficiency of grounds in show-cause letter - Whether plaintiff's misconduct condoned by defendants - Public Officers (Conduct and Discipline) General Orders 1980 (Chapter 'D'), general

E

order 26(5) - Federal Constitution, art. 135(2)

ADMINISTRATIVE LAW: *Public servants - Dismissal of police officer - Procedural fairness - Opportunity of being heard - Whether written representations satisfy demands of natural justice - Whether oral hearing*

F

obligatory - Whether disciplinary authority must appoint committee of inquiry - Whether disciplinary authority has full discretion to decide if it needs 'further clarification' - Sufficiency of grounds in show-cause letter - Whether plaintiff's misconduct condoned by defendants - Public Officers (Conduct and Discipline) General Orders 1980 (Chapter 'D'), general

G

order 26(5) - Federal Constitution, art. 135(2)

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Dismissal of police officer - Procedural fairness - Opportunity of being heard - Whether written representations satisfy demands of natural justice - Whether oral hearing obligatory - Whether disciplinary authority*

H

must appoint committee of inquiry - Whether disciplinary authority has full discretion to decide if it needs 'further clarification' - Whether court would be exercising appellate jurisdiction if it steps into shoes of disciplinary authority

I

The plaintiff was a police inspector with the Royal Malaysian Police. Disciplinary action was taken against him under general order 26 of the Public Officers (Conduct and Discipline) General Orders 1980 (Chapter 'D') (hereinafter 'the GO80'). He was issued a show-cause letter containing four allegations of misconduct against him. The Disciplinary Authority ('the DA') found that his representations were not exculpatory of the charges and decided to dismiss him from the force. The plaintiff then brought an action against the defendants seeking judicial review and a declaration that his dismissal from the police force was wrong in law. The High Court dismissed the action.

Before the Court of Appeal, the plaintiff challenged his dismissal on account that: (i) the show-cause letter did not contain the necessary grounds/charges which could support the defendants' findings and the punishment of dismissal; and (ii) he was not given an opportunity of being heard *via* a committee of enquiry.

Held (dismissing the appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The Public Officers (Conduct and Discipline) Regulations 1993 had no application in the instant case. The applicable law in 1992 when disciplinary proceedings were being taken against the plaintiff was the GO80, in particular Part II thereof. (para 13)

(2) It was very clear that the grounds/charges were stated concisely in the show-cause letter. There was thus no merit in the plaintiff's contention to the contrary. (paras 14, 15 & 16)

(3) Pursuant to general order 26(5) of the GO80, the DA has the discretion to decide if a case requires further clarification. Hence, the decision as to whether a committee of inquiry would need to be appointed (and whether the plaintiff would be required to appear and give oral evidence) laid with the DA and not with the court or the plaintiff. (paras 22, 24 & 30)

(3a) The rules of natural justice and the concept of procedural fairness - with regard to the dismissal of members of the public service - are embodied in art. 135(2) of the Federal Constitution ('the FC'). However, 'a reasonable opportunity of

being heard' does not connote an oral hearing, and the right to be heard does not entail an obligation to hold an inquiry. The absence of an oral hearing does not automatically amount to a denial of natural justice. In the eyes of art. 135(2) of the FC and general order 26 of the GO80, the requirement of fairness is satisfied by an opportunity to make written representations to the DA, which, in this case, the plaintiff had availed himself of. (Following *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal*, Per Abdul Malek Ahmad FCJ.) (paras 25, 26, 27, 28, 31 & 35)

(4) The defendants' actions in approving the plaintiff's application for unpaid leave (to further his studies abroad) and in promoting him from a chief inspector to an acting assistant superintendent of police did not amount to condonation on the part of the defendants. (paras 34)

Per Abdul Malik Ishak JCA (supporting):

(1) In determining whether there was procedural fairness in the decision-making process of the DA, it is clear from the provisions of the GO80 that the Legislature never intended that the courts should step into the shoes of the DA and decide whether it would have been fair to have given the plaintiff an opportunity to be heard orally. (Following *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu*, per Zaki PCA.) (paras 63 & 64)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif bertugas sebagai seorang Inspektor Polis dengan Polis di Raja Malaysia. Satu tindakan disiplin telah diambil tehadap plaintif di bawah peraturan am 26 Peraturan-Peraturan Am Pegawai Awam (Tatalaku dan Disiplin) (Bab 'D') 1980 ('PA80'). Satu surat tunjuk sebab yang mengandungi empat pertuduhan telah diserahkan kepadanya. Pihak Berkuasa Disiplin ('PD') mendapati bahawa representasi plaintif gagal membersihkan namanya dari pertuduhan-pertuduhan, dan kerana itu memutuskan untuk membuang kerja plaintif dari pasukan polis. Berikutnya plaintif membawa tindakan semakan kehakiman terhadap defendan-defendan sekaligus memohon pengisytiharan bahawa pembuangan kerjanya adalah tak sah di sisi undang-undang. Tindakannya bagaimanapun ditolak oleh Mahkamah Tinggi.

Di hadapan Mahkamah Rayuan, plaintif mencabar pembuangan kerjanya atas alasan-alasan berikut: (i) surat tunjuk sebab tidak mengandungi alasan-alasan/pertuduhan-pertuduhan perlu yang boleh menyokong dapatan defendan-defendan serta hukuman buang kerja; dan (ii) beliau telah tidak diberikan peluang untuk didengar melalui satu jawatankuasa siasatan.

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Peraturan-Peraturan Am Pegawai Awam (Tatalaku dan Disiplin) (Bab 'D') 1993 tidak terpakai kepada kes di sini. Undang-undang yang terpakai pada tahun 1992 bilamana tindakan disiplin diambil terhadap plaintif adalah PA80, terutama Bahagian II nya.

(2) Adalah jelas bahawa alasan-alasan/pertuduhan-pertuduhan telah dinyatakan secara terperinci di dalam surat tunjuk sebab. Maka pengataan plaintif yang sebaliknya adalah tidak bermerit.

(3) Berdasarkan perintah am 26(5) PA80, PD mempunyai budibicara untuk memutuskan sama ada sesuatu kes itu memerlukan kepada penjelasan lanjut. Oleh itu, keputusan sama ada suatu jawatankuasa siasatan perlu dilantik (dan sama ada plaintif diperlukan untuk hadir bagi memberi keterangan lisan) adalah terletak pada PD dan bukannya mahkamah atau plaintif.

(3a) Kaedah-kaedah keadilan asasi dan konsep keadilan prosedur - dalam kaitannya dengan pembuangan kerja kakitangan perkhidmatan awam - terkandung di dalam fasal 135(2) Perlembagaan Persekutuan ('PP'). Bagaimanapun, 'suatu peluang munasabah untuk didengar' tidak semestinya bererti pendengaran lisan, dan hak untuk didengar tidak menuntut satu obligasi untuk mengadakan satu siasatan. Maka ketiadaan suatu pendengaran lisan, dan hak untuk didengar tidak semestinya membawa kepada penyangkalan keadilan asasi. Di sisi fasal 135(2) PP dan perintah am 26 PA80, kehendak keadilan telah terpenuhi dengan pemberian peluang untuk membuat representasi bertulis kepada PD, yang mana, dalam

A kes di sini, telah pun dimanfaatkan oleh plaintif. (*Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* (diikuti).

(4) Tindakan defendan-defendan dalam meluluskan permohonan
B plaintif untuk cuti tanpa gaji (untuk membolehkan beliau melanjutkan pelajaran ke luar negeri) dan dalam menaikkan pangkatnya dari Ketua Inspektor kepada Penolong Penguasa Polis, tidak menjadi suatu condonation di pihak defendan-defendan.

C **Oleh Abdul Malik Ishak HMR (menyokong):**

(1) Dalam menentukan sama ada terdapat ketidakadilan prosedur di pihak PD dalam proses membuat keputusannya, jelas dari peruntukan-peruntukan PA80 bahawa Badan Perundangan tidak
D pernah berniat bahawa mahkamah harus memakai kasut PD dan memutuskan sama ada ianya adil untuk memberikan plaintif hak untuk didengar secara lisan. (*Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* (diikuti).

E *[Proses membuat keputusan defendan-defendan adil; keputusan Mahkamah Tinggi disahkan.]*

Case(s) referred to:

A-G v. Ryan [1980] AC 718 ***(refd)***

Amin v. Entry Clearance Officer, Bombay [1983] 2 AC 818 ***(refd)***

F *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation [1948] 1 KB 223* ***(refd)***

Beattie v. Parmenter [1888-89] 5 TLR 396 ***(refd)***

Bremer Handelsgesellschaft MBH v. C Mackprang Jr [1979] 1 Lloyd's Law Reports 221 CA ***(refd)***

G *Brind and Others v. Secretary of State for the Home Department [1991] 1 All ER 720* ***(refd)***

Central London Property Trust Limited v. High Trees House Limited [1947] 1 KB 130 ***(refd)***

Chief Constable of North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***

Corry v. Clouston & Co (Limited) [1904] 23 NZLR 595 ***(refd)***

H *Council of Civil Service Union v. Minister of Civil Service [1985] AC 374* ***(refd)***

Craine v. The Colonial Mutual Fire Insurance Company Limited And Another [1920] 28 CLR 305 ***(refd)***

Doe D Nash v. Birch ER 150 Exch 1 M & W 402 ***(refd)***

I *Ganasan Marimuthu v. Public Services Commission & Anor [1998] 4 CLJ 331 CA* ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(foll)***

Lonrho Plc v. Secretary Of State For Trade And Industry And Another Appeal [1989] 2 All ER 609 ***(refd)***

Lucas v. Premier Motors Ltd [1928] 4 DLR 526 ***(refd)***

LW Middleton v. Harry Playfair AIR 1925 Calcutta 87 ***(refd)***

Matthews v. Smallwood [1910] 1 Ch 777 ***(refd)***

Meyrick v. Stirling Bros, Limited [1899-1901] 1-3 WAR 51 ***(refd)***

Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India (The "Kanchenjunga") [1990] 1 Lloyd's Law Reports 391 ***(refd)***

Najar Singh v. Government of Malaysia & Anor [1976] 1 LNS 81 PC ***(refd)***

Najar Singh v. Government of Malaysia & Anor [1974] 1 LNS 101 FC ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***

Nottinghamshire County Council v. Secretary of State for the Environment, City of Bradford Metropolitan Council v. Secretary of State for the Environment [1986] 1 AC 240 ***(refd)***

Phillips v. Foxall [1871-72] 7 LRQB 666 ***(refd)***

Preston v. Inland Revenue Commissioners [1985] AC 835 ***(refd)***

Public Service Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(foll)***

R v. Panel on Take-overs and Mergers, ex parte Datafin Plc And Another (Norton Opax Plc And Another Intervening) [1987] QB 815 ***(refd)***

Shun Fat Container Service Co Ltd & Ors v. Commissioner for Transport [1989] 2 HKC 301 ***(refd)***

T Ganeswaran lwn. Suruhanjaya Polis DiRaja Malaysia & Satu Lagi [2005] 3 CLJ 302 CA ***(refd)***

The Earl of Darnley v. The Proprietors, & C. Of The London, Chatham, and Dover Railway [1867] LR 2 HL 43 ***(refd)***

The Federal Supply and Cold Storage Company of South Africa (Limited) v. Angehrn And Piel [1910] LT 626 ***(refd)***

The Manager, Scudai Estate, Johore Bahru v. Narayanan [1960] 1 LNS 149 HC ***(refd)***

WJ Alan & Co Ltd v. El Nasr Export And Import Co [1972] 1 Lloyd's Law Reports 313 ***(refd)***

Yeung Chee-Kiu v. Lam Chee Trading As Yau Fat Furniture Co [1966] HKDCLR 65 ***(refd)***

Zainal Hashim v. Goverment of Malaysia [1979] 1 LNS 132 PC ***(refd)***

A **Legislation referred to:**
Federal Constitution, art. 135(2)
Public Officers (Conduct and Discipline) Regulations 1993, reg 28
Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GO 4(2), 24, 25, 26(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11)
B
Road Traffic (Traffic Control) Regulations [HK], reg. 14

For the appellant/plaintiff - Haniff Khatri; M/s Haniff Khatri
For the defendants/respondents - Shamsul Bolhassan SFC

C *[Appeal from High Court, Kuala Lumpur; Summons No: S2-21-47-1996]*

Reported by Gan Peng Chiang

D

JUDGMENT

Low Hop Bing JCA:

Appeal

E
[1] This is the appellant's ("the plaintiff's) appeal against the decision of the Kuala Lumpur High Court which dismissed with costs the plaintiff's writ of summons seeking judicial review and declaration that the dismissal of the plaintiff from service was wrong in law, null and void.
F

[2] We now set out our grounds for dismissing the plaintiff's appeal.

Factual Background

G
[3] At the time of dismissal, the plaintiff was attached to the Royal Malaysian Police, Bukit Aman, as a police inspector. Disciplinary action was taken against him pursuant to General Order 26 ("GO 26") of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 ("the 1980 GO").
H

[4] The first respondent ("the first defendant") had issued a show-cause letter dated 23 November 1992 ("the show-cause letter") to the plaintiff, informing him of the four grounds on which to take disciplinary action against him, with a view to dismissal from service. The plaintiff was given 16 days to submit his written representation to exculpate himself.
I

[5] By letter dated 12 December 1992, the plaintiff made his representation in response to the show-cause letter.

[6] *Vide* letter dated 6 April 1993, the first defendant informed the plaintiff that his representation did not exculpate himself and that the Disciplinary Authority ("the DA") had made a decision that he be dismissed with effect from 27 April 1993.

Judicial Review

[7] As the plaintiff is seeking judicial review, we find it useful to refer to *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141, where the House of Lords held *inter alia* as follows:

> Judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and, therefore, the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable.
>
> Judicial review is concerned, not with the decision, but with the decision-making process. Unless the restriction on the power of the court is observed, the court will … under the guise of preventing the abuse of power, be itself guilty of usurping power.

[8] The above passage was applied by this Court through the judgment of Alauddin Mohd Sheriff FCJ (now PCA) in *T Ganeswaran lwn. Suruhanjaya Polis DiRaja Malaysia & Satu Lagi* [2005] 3 CLJ 302. (See also the Federal Court judgment delivered by Peh Swee Chin FCJ (as he then was) in *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405, 411b to 412d.)

[9] In determining whether to quash or declare a decision as wrong in law, null and void, it is only necessary for the court to consider whether, in dismissing a public officer, the DA had failed to observe the rules of natural justice; apply the *Wednesbury* principles of unreasonableness; or failed to understand correctly the law that regulates his decision-making power, and give effect to it. The grounds for judicial review may be compendiously classified under three heads *viz* 'procedural impropriety', 'irrationality' and 'illegality': See *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333, 342 per Mohd Jemuri Serjan CJ (Borneo), applying the principles enunciated by Lord Diplock in *Council of Civil Service Union v. Minister of Civil Service* [1985] AC 374, 410 HL.

General Order 26

[10] Plaintiff's learned counsel Mr Haniff Khatri attacked the show-cause letter which he argued did not contain the grounds in support of the second defendant's finding and sanction of dismissal imposed on the plaintiff. He added that the defendants should set up a committee of inquiry ("CI") and give the plaintiff an opportunity of being heard, failing which the defendants had breached the dismissal procedure set out in reg. 28 of the Public Officers (Conduct and Discipline) Regulations 1993 ("the 1993 GO"), and so it is amenable to judicial review.

[11] Learned senior federal counsel Mr Shamsul Bolhassan replied that, in the instant appeal, disciplinary proceedings were taken against the plaintiff in compliance with Part II of the 1980 GO.

[12] The above submissions have given rise to two questions for determination as follows:

(1) Did the show-cause letter contain the necessary grounds in support of the second defendant's finding and sanction of dismissal imposed on the plaintiff? and

(2) On the above factual background, was the plaintiff entitled to appear before a CI and be given the opportunity of being heard therein?

[13] Before we consider question (1) above, we are constrained to say that, with the utmost respect to plaintiff's learned counsel, the 1993 GO had no application herein as it had yet to become law in 1992 when disciplinary proceedings were taken against the plaintiff. In the instant appeal, plaintiff's learned counsel appeared to have inadvertently and erroneously relied on the 1993 GO. The governing law is to be found in the 1980 GO.

[14] The show-cause letter alluded to in question (1) consists of three pages. The issue raised in question (1) revolves around a question of fact. The show-cause letter had informed the plaintiff of his breach of discipline, and so the DA has decided to take disciplinary action against him under GO 26.

[15] The gist of the four grounds and charges contained in the show-cause letter may be stated as follows:

(1) The plaintiff had corruptly accepted four "Bridgestone" tyres and four valves for the tyres, amounting to RM560 from one Tick Chai or Allan Chai, as consideration for the return of 80 customers' cards which were seized from Asia Video Centre;

(2) The plaintiff had falsely stated in his official diary that he was at home on 31 July 1983 between 1630hours and 2400hours when he was actually conducting a raid at Asia Video Centre;

(3) The plaintiff had failed to make an entry in his official diary from 22 August 1985 to 4 September 1985 when his official diary was seized by the Anti Corruption Agency; and

(4) The plaintiff had owned a Honda Accord motorcar without permission.

[16] As a matter of fact, it is abundantly clear to us that the grounds had been concisely stated in the show-cause letter. The answer to question (1) is in the affirmative. Hence, we find no merits in the plaintiff's contention advanced pursuant to question (1).

Procedural Fairness

[17] Question (2) concerns the issue of procedural fairness. Part II of the 1980 GO contains comprehensive disciplinary procedure regulating the dismissal or reduction in rank or other disciplinary action to be taken against a public officer such as the plaintiff

[18] GO 24 empowers the DA to determine the nature of the breach of discipline, whether it warrants a punishment of dismissal, reduction in rank or any other lesser punishment. If the breach warrants a dismissal or reduction in rank, the DA would follow the procedure contained in GO 26: GO 26(1). Otherwise, the DA will proceed under GO 25 which provides for the procedure in cases meriting punishment lesser than dismissal or reduction in rank.

[19] Where the DA is satisfied under GO 26(2) that there exists a *prima facie* case against the officer, the DA shall issue a letter to the officer containing the facts of the disciplinary offences and the grounds on which it is proposed to dismiss the officer or to reduce his rank. The officer is then required to make a representation not less than 14 days containing the grounds upon which he relies to exculpate himself.

[20] Under GO 26(3), if after consideration, the DA is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant a dismissal or reduction in rank, the DA may impose a lesser punishment as it may deem fit.

[21] Pursuant to GO 26(4), if the officer does not make any representation or that his representation does not exculpate himself to the satisfaction of the DA, the DA shall proceed to consider and decide whether to dismiss him or to reduce his rank.

[22] If the DA considers that a case against the officer requires further clarification, it may appoint a CI consisting of not less than two senior Government officers, but an officer lower in rank than the officer who is the subject matter of the inquiry or the officer's Head of Department shall not be selected to be a member of the CI: GO 26(5). Under GO 26(6), the officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the CI and he shall be required to appear and exculpate himself. GO 26(7) further states that if witnesses are examined by the CI, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf, and no documentary evidence shall be used against him unless he has previously been supplied with a copy or given access thereto. The CI may permit the Government or the officer to be represented by an officer in the public service or exceptionally by an advocate or solicitor: GO 26(8). If during the course of the inquiry, further grounds for dismissal are disclosed, and the DA thinks fit to proceed upon such grounds, the officer shall be furnished with the written statement thereof: GO 26(9). The CI, having inquired into the matter, shall make a report to the DA. If the DA considers that the report is not clear, the matter may be referred back to the CI for further inquiry and report: GO 26(10).

[23] Under GO 26(11), having considered the report, if the DA is of the opinion:

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly; or

(b) that the officer does not deserve to be dismissed or reduced in rank but deserves a lesser punishment, it may inflict upon the officer such lesser punishment accordingly; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, the DA shall recommend to the Government accordingly.

[24] It is for the DA (not the officer nor the court) to decide whether to require further clarification, to appoint a CI for the officer to exculpate himself at the CI, and to give oral evidence there: *Public Service Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573 per Zaki Tun Azmi PCA (now CJ Malaysia).

[25] The concept of procedural fairness is a modern manifestation of the rules of natural justice and has found constitutional recognition, being enshrined in art. 135(2) of the Federal Constitution which states that no member of the public service shall be dismissed or reduced in rank without being given the reasonable opportunity of being heard: See *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777, 785C FC per Siti Norma Yaakob FCJ (later CJ(M)).

[26] It is trite law that under art. 135(2), the reasonable opportunity of being heard does not connote an oral hearing, and the right to be heard does not entail an obligation to hold an inquiry: *Najar Singh v. Government of Malaysia & Anor* [1974] 1 LNS 101, as affirmed by the Privy Council on appeal in [1976] 1 LNS 81; *Zainal Hashim v. Goverment of Malaysia* [1979] 1 LNS 132; and *A-G v. Ryan* [1980] AC 718.

[27] Article 135(2) and GO 26 were considered by the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525. There, the disciplinary board had terminated the services of Utra Badi pursuant to GO 26. Utra Badi contended in the High Court that his dismissal was unjust and that he should have been given an oral hearing prior to the dismissal. The High Court decided in his favour. The Court of Appeal, in affirming the High Court decision, held that Utra Badi had been deprived of his right to make representation on punishment; and there was failure of procedural fairness as Utra Badi was deprived of an oral hearing before the imposition of punishment. In the Federal Court, the issues that arose for determination were:

(1) Whether a show-cause letter issued by the disciplinary board prior to dismissing Utra Badi had sufficiently complied with the requirement of giving a public officer a reasonable opportunity of being heard under art. 135(2)? and

(2) Whether the disciplinary board was required to afford Utra Badi an oral hearing under art. 135(2)?

[28] Abdul Malek Ahmad FCJ (later PCA) held to the following effect:

(1) Under art. 135(2), Utra Badi had been accorded reasonable and sufficient opportunity to defend himself *via* the show-cause letter which, at the earliest available moment, had informed him of the possible punishment under consideration, should he be unable to exculpate himself of the charges made against him;

(2) The General Orders, in detailing the procedures therein, have sufficiently complied with art. 135(2) and, in the process, are in accord with the concept of natural justice and procedural fairness;

(3) There is certainly no separate right to make representations upon the punishment to be meted out to the officer to be dismissed or reduced in rank; and

(4) The right to be heard as given by art. 135(2) does not necessitate that the person concerned be given an oral hearing. Therefore, in the absence of such a hearing, one cannot conclude that it amounts to a denial of natural justice. In matters involving GO 26, the requirement of fairness is satisfied by an opportunity to make written representation to the deciding body.

[29] In *Ganasan Marimuthu v. Public Services Commission & Anor* [1998] 4 CLJ 331 CA, the appellant, a technician attached to the Telecoms Department, was dismissed from public service following charges that he had made unauthorized telephone calls to India and had thereby conducted himself in contravention of the code of conduct under GO 4(2). Prior to his dismissal, the appellant was given the opportunity of making a written representation to the disciplinary authority, and that it was upon considering that representation that the DA had decided to invoke GO 26(4) and

dismiss the appellant. The DA, in considering the written representation, had not acceded to the appellant's request for legal representation. The appellant argued that the DA had therefore acted in breach of the rules of natural justice, and so applied for a declaration that his dismissal was null and void and of no effect. The High Court dismissed the application. On appeal, the issue that arose was whether the DA could be said to have contravened the rules of natural justice when it did not afford the appellant the opportunity to engage a solicitor. NH Chan JCA (as he then was) who delivered the judgment of this court, held *inter alia* that at the DA stage, a fair hearing does not mean that there must be an opportunity to be heard orally. The opportunity afforded to the appellant to make the written representation is sufficient to meet the demand of fairness. GO 26(4) makes no provision for a public officer or his legal representative to appear before any person or body. It is only when the DA deems it necessary to appoint, and does appoint, a CI under GO 26(5), that the appellant, under GO 26(6), will have the opportunity of giving oral testimony to exculpate himself. It is only then that the CI has a discretion, under GO 26(8), whether to allow the appellant to be represented either by a public officer or an advocate and solicitor.

[30] In *Ghazi Mohd Sawi*, *supra*, the (then) Supreme Court expressed a similar sentiment and held that, under GO 26(4), only if the DA considers that the case against the public officer requires further clarification that the DA is obliged to appoint a CI. In such an event, both parties may be legally represented.

[31] Reverting to the mainstream of the instant appeal, we note that the proceedings against the plaintiff had stopped at the stage where GO 26(4) applied and the plaintiff was dismissed. The matter did not proceed to the level where a CI had to be formed, as the DA did not require further clarification from the plaintiff. Consequently, the opportunity for the plaintiff to give oral testimony at a CI to exculpate himself, or to be legally represented, did not arise. In the circumstances, we are unable to sustain the plaintiff's contention that the DA has failed to comply with the fundamental requirements of procedural fairness. Our answer to Question (2) is in the negative.

A

Condonation

[32] The next and final issue raised for the plaintiff was that the second defendant's approval on 30 September 1992 of the plaintiff's application for extension of unpaid leave to finish his studies abroad and promotion from the post of Chief Inspector to that of acting Assistant Superintendent of Police (ASP) had clearly cast a doubt on the *prima facie* charges against the plaintiff.

[33] It was contended for the defendants that the plaintiff was never charged, tried or found guilty in any court of law. The issue of *prima facie* charges here is '*prima facie*' in the disciplinary proceedings, and so there was no condonation by the defendants.

[34] We could not find any evidence of any condonation or circumstance from which an inference of condonation may be drawn. The plaintiff had not been excused from any of the four disciplinary charges against him. In any event, the defendants' approval of the plaintiff's application for unpaid leave to further his study and the acting post of ASP were separate and distinct from the process of judicial review before us. We are not concerned with the decision of the DA in granting the plaintiff study leave and the acting post. The DA had in effect vigorously pursued the charges against the plaintiff, which culminated in his dismissal from service. The plaintiff's submission in this regard is without any substance whatsoever.

Conclusion

[35] The defendants' decision-making process resulting in the dismissal of the plaintiff had been carried out in accordance with procedural fairness. We found no error on the part of the learned High Court judge. We therefore dismissed the plaintiff's appeal and affirmed the decision of the High Court. Costs of RM2,000 to the defendants. Deposit to the defendants on account of fixed costs.

[36] My learned brother Haji Abdul Malik bin Haji Ishak JCA has also written a separate judgment in support of this judgment.

Abdul Malik Ishak JCA:

[37] I have read the judgment of my learned brother Low Hop Bing, JCA and I totally agree with his Lordship that the plaintiff's appeal should be dismissed forthwith. In support of his Lordship's judgment, I have this to say.

[38] The court's sole function in a judicial review is to scrutinise the decision-making process and not to question the decision itself. Put differently, the court is only concerned in reviewing not the merits of the decision but rather the decision-making process of the decision-maker. It is thus different from hearing an appeal proper. When hearing an appeal the court is concerned with the merits of the decision under appeal.

[39] Lord Fraser of Tullybelton in *Amin v. Entry Clearance Officer, Bombay* [1983] 2 AC 818 at 829, [1983] 2 All ER 864 at 868, HL, rightly observed that:

> Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. No abuse of authority or unfair treatment such as would call for judicial review is alleged here, where the appellant's case rests simply on an assertion of a legal right of appeal. Judicial review is entirely different from an ordinary appeal. It is made effective by the court's quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal, where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

[40] In *Brind and Others v. Secretary of State for the Home Department* [1991] 1 All ER 720, at p. 737, HL, Lord Lowry had this to say:

> ... judicial review of administrative action is a supervisory and not an appellate jurisdiction.

[41] And further down at p. 738, Lord Lowry said that the court

> "is not sitting on appeal, but satisfying itself whether the decision-maker has acted within the bounds of his discretion."

[42] The same sentiments were expressed by Sir John Donaldson MR in *R v. Panel on Take-overs and Mergers, ex parte Datafin Plc And Another (Norton Opax Plc And Another Intervening)* [1987] QB 815, at p. 842, [1987] 1 All ER 564, at p. 580, CA; and by Lord Keith of Kinkel in *Lonrho Plc v. Secretary Of State For Trade And Industry And Another Appeal* [1989] 2 All ER 609, at p. 617, HL, [1989] 1 WLR 525, at p. 535, HL

[43] One may ask, what is the purpose of the remedy of judicial review? The answer is quite simple. It is to ensure that the individual is given a fair treatment by the decision-maker to which

A he has been subjected to. But it is not the function of the court to substitute its own view for that of the decision-maker. In *Shun Fat Container Service Co Ltd & Ors v. Commissioner for Transport* [1989] 2 HKC 301, where the respondent prohibited vehicles over 11 metres in length from using a certain road. The applicants wrote B to the respondent stating that the closure of the road to the affected vehicles would cause considerable loss and damages to them. The respondent decided, after considering different views expressed by a variety of other interested parties, that the powers given by reg. 14 of the Road Traffic (Traffic Control) Regulations C (25 August 1984) LN 303 of 1984 and for reasons of road safety, the road in question would be designated as a prohibited zone prohibiting the driving of any motor vehicles over 11 metres in length on that road. Being dissatisfied, the applicants applied for judicial review of the decision. In the course of the hearing, the D applicants sought to persuade the court to hear further evidence on the basis that if this further evidence was admitted it would show that the respondent's views on road safety, particularly in connection with the road in question, were wrong. His Lordship Godfrey J, rejected the further evidence and in dismissing the application, the E learned judge was emphatic in reiterating the English position that it was not the function of the court to substitute its own view for that of the decision-maker. At p. 311, this was what Godfrey J, said:

> But these matters, in my judgment, are not matters for me. It is not F for the court to substitute its own (or anyone else's) view for that of the respondent on the matter whether or not the use of a road ought to be restricted on grounds of road safety. The court is concerned only to review the decision, not to reconsider it. If the decision has been arrived at illegally, improperly or irrationally, it is amenable to review. But the court never substitutes its own G judgment for that of the decision maker. If it is believed that this is the function of the court upon a judicial review, then it is time that belief was dispelled. The remedy by way of judicial review is a very useful one which enables the court to control acts of government which constitute an abuse of power. But if the remedy is itself H abused it will become worse than useless; it will become a snare and a delusion.

[44] In regard to the submission that the respondent took into consideration matters other than road safety, Godfrey J, had this to say at the same page:

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> It is not for me to balance the considerations for and against making a restriction order; that would involve the court's usurping the function of the respondent. My task is simply to review the decision made by the respondent. I have to say that I cannot fault his decision. It was not unlawful; it was not improper; and it was not irrational. There is no doubt that, as was submitted to me, he had before him a number of considerations, over and above road safety considerations. Having canvassed the views of a wide number of people, this is hardly surprising. But did he rely on such considerations? If I had felt able to conclude on the material before me that the decision at which the respondent had arrived was not taken on road safety grounds but was taken on some other ground, or on that and other grounds, I would have thought the matter susceptible to review and I would have quashed his decision. But there is no material before me upon which I can or should come to that conclusion. The applicants have not shown that any ground, other than the road safety ground on which the respondent relied, lay at the foundation of his decision.

[45] Although the facts in *Shun Fat Container Service Co Ltd & Ors v. Commissioner for Transport (supra)* are poles apart from the present appeal, yet the principles of law enunciated by Godfrey J, are of universal application.

[46] The court is concerned with whether a decision making authority has exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached (*Associated Provincial Picture Houses, Limited v. Wednesbury Corporation* [1948] 1 KB 223, at p. 229, [1947] 2 All ER 680, at p. 683, CA, per Lord Greene MR) or abused its powers (*Preston v. Inland Revenue Commissioners* [1985] AC 835, at p. 862, [1985] 2 All ER 327, at p. 337, HL, per Lord Templeman).

[47] It is correct to say that the grounds upon which administrative action is subject to control by judicial review have been compendiously classified as threefold (*Council of Civil Service Unions and others v. Minister for the Civil Service* [1985] AC 374, at p. 410, [1984] 3 All ER 935, at p. 950, HL, per Lord Diplock). And according to Lord Diplock in that case:

> That is not to say that further development on a case by case basis may not in course of time add further grounds.

[48] Indeed in the same case, Lord Diplock added a further ground by making reference to the principle of proportionality (see p. 410 of the Appeal Cases Report and p. 950 of the All England Reports for the case of *Council of Civil Service Unions and Others v. Minister for the Civil Service*). The principle of proportionality states that administrative measures must not be more drastic than is necessary for attaining the desired result (Jurgen Schwarze, *European Administrative Law*, 1944, 680 (London: Sweet & Maxwell 1992); Judicial Review edited by Michael Supperstone, James Goudie 2nd ed. (London: Butterworths, 1997)).

[49] Now, the three fold classification may be stated as follows. The first ground is "illegality" and in this context the decision-maker must understand correctly the law that regulates his decision and he must give effect to it. The second ground is focussed on "irrationality" and that would be *Wednesbury* unreasonableness. One must not forget that the concept of "irrationality" may vary according to the circumstances of the case (*Associated Provincial Picture Houses, Limited v. Wednesbury Corporation (supra)*). The third ground relates to "procedural impropriety". Lord Diplock in *Council of Civil Service Unions And Others v. Minister for the Civil Service (supra)* aptly described the third ground as "procedural impropriety" because his Lordship felt that "susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

[50] The law journals are replete with expressions like "the Wednesbury principle", "Wednesbury unreasonableness", or "on Wednesbury grounds". In *Nottinghamshire County Council v. Secretary of State for the Environment, City of Bradford Metropolitan Council v. Secretary of State for the Environment* [1986] 1 AC 240, at p. 249, Lord Scarman explained it better in these words:

> 'Wednesbury principles' is a convenient legal 'shorthand' used by lawyers to refer to the classical review by Lord Greene M.R. in the Wednesbury case of the circumstances in which the courts will intervene to quash as being illegal the exercise of an administrative discretion.

[51] In *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation (supra)*, at p. 229, Lord Greene MR expounded "the Wednesbury principle" in this way:

> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v. Poole Corporation* [1926] Ch 66, 90, 91, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

[52] Here, there was a show cause letter dated 23 November 1992 incorporating the four charges wherein the plaintiff was informed that disciplinary action would be taken against him pursuant to General Order 26 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 with a view to dismissal from service. The plaintiff was accorded 16 days to enable him to make his written representation in order to exculpate himself. After considering the written representation by the plaintiff, the disciplinary authority decided to dismiss the plaintiff with effect from 27 April 1993. And the right to be heard does not mean that an oral hearing should be accorded to the plaintiff nor should there be a committee of inquiry to be set up for the benefit of the plaintiff.

[53] The four charges against the plaintiff have been set out by my learned brother Low Hop Bing, JCA and they are certainly quite serious, to say the least.

[54] The necessity for further clarification from the plaintiff together with the need to appoint a committee of inquiry as well as the requirement of giving oral evidence by the plaintiff are within the domain of the disciplinary authority and not the court. The court certainly cannot substitute its own view for that of the disciplinary authority. The manner in which the decision was made by the disciplinary authority cannot be faulted. It is beyond reproach.

[55] In regard to condonation, I have this to say.

[56] It has its origin in the common law (*Phillips v. Foxall* [1871-72] 7 LRQB 666, at p. 680; and *Beattie v. Parmenter* [1888-89] 5 TLR 396, at p. 397) and it has been accepted in Australia as seen in the case of *Meyrick v. Stirling Bros. Limited* [1899-1901] 1-3 WAR 51, in New Zealand as reflected in the case of *Corry v. Clouston & Co (Limited)* [1904] 23 NZLR 595, SC, in South Africa as demonstrated in the case of *The Federal Supply and Cold Storage Company of South Africa (Limited) v. Angehrn and Piel* [1910] LT 626, in India as shown in the case of *LW Middleton v. Harry Playfair* AIR 1925 Calcutta 87, at p. 92, in Canada as can be seen in the case of *Lucas v. Premier Motors Ltd* [1928] 4 DLR 526, in Malaysia as reflected in the case of *The Manager, Scudai Estate, Johore Bahru v. Narayanan* [1960] 1 LNS 149, and, finally, in Hong Kong as seen in the case of *Yeung Chee-Kiu v. Lam Chee Trading As Yau Fat Furniture Co* [1966] HKDCLR 65, at p. 68.

[57] Very often condonation is referred to as a waiver. According to Lord Goff in *Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Law Reports 391, at p. 398, condonation as a waiver is not a variation of the contract and does not require consideration to support it. It is said that condonation prevents an employer from punishing an employee not because for a breach of a contractual duty but rather because the employer has condoned the misbehaviour of the employee and it is unconscionable or inequitable for the employer to be permitted to deny the effect of his words or conduct. Equity gives birth to the idea of unconscionable or inequitable conduct in the 20th century starting with the case of *Central London Property Trust Limited v. High Trees House Limited* [1947] 1 KB 130 and culminating in *Bremer Handelsgesellschaft MBH v. C Mackprang Jr* [1979] 1 Lloyd's Law Reports 221, CA.

[58] In *Bremer Handelsgesellschaft MBH v. C Mackprang Jr (supra)*, Lord Denning at p. 226 said: A

> I regard the decision of the House in *Bremer v. Vanden* [1978] 2 Lloyd's Rep 109 as a most important decision on waiver. As Mr. Davenport said, it is the final step in the series of *Central London Property Trust Ltd. v. High Trees House*, [1947] KB 130; *Rickards v. Oppenheim,* [1950] 1 KB 616; *Panchaud Freres SA v. Etablissements General Grain Co,* [1970] 1 Lloyd's Rep. 53; and *WJ Alan & Co v. El Nasr Export & Import Co. Ltd.,* [1972] 1 Lloyd's Rep. 313; [1972] 2 Q.B. 189. B

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[59] Again, in *Bremer Handelsgesellschaft MBH v. C Mackprang Jr (supra)* at p. 225, Lord Denning relied on his own judgment in *WJ Alan & Co Ltd v. El Nasr Export And Import Co* [1972] 1 Lloyd's Law Reports 313, at p. 323, CA, [1972] 2 QB 189, at p. 231, CA when explaining the principle of waiver. This was what his Lordship said: D

> ... If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so ... E

[60] And it is this very passage that serves as the modern basis of condonation. Here, there was no condonation. The unpaid leave granted to the plaintiff to further his study and the acting post of Assistant Superintendent of Police given to the plaintiff were separate issues. They are distinct from the process of judicial review. Moreover, at that point of time, the report from the Anti-Corruption Agency was not available and the first defendant did not know of the plaintiff's misconduct. Once the first defendant came to know of the plaintiff's misconduct, disciplinary proceedings were initiated against him. F G

[61] According to Lord Chelmsford LC in *The Earl of Darnley v. The Proprietors, & C Of The London, Chatham, and Dover Railway* [1867] LR 2 HL 43, at p. 57: H

> A waiver must be an intentional act with knowledge.

[62] For a waiver to arise, there must, firstly, be "some distinct act ought to be done, to constitute a waiver" (per Parke B in *Doe D Nash v. Birch* ER 150 Exch. 1 M & W 402, 406). Secondly, it I

must be "intentional" in the sense that it is intended to treat the matter as if the condition did not exist or as if the forfeiture or breach of condition had not occurred (per Isaacs J in *Craine v. The Colonial Mutual Fire Insurance Company Limited And Another* [1920] 28 CLR 305, at p. 326). Lastly, what is being done must be done with "knowledge" (*Matthews v. Smallwood* [1910] 1 Ch 777).

[63] All these legal principles serve as mere guidelines At the end of the day the crucial question to pose as was posed by the Federal Court in *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573, at p. 585 would be (per Zaki Tun Azmi, PCA (now Chief Justice of Malaysia)):

> Whether the court could place itself in the shoes of the disciplinary authority acting under the general orders in determining whether a particular procedure is fair or not.

[64] Continuing at p. 588 of the same case, his Lordship had this to say:

> From the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it.

[65] Further down at p. 592 of the same case, his Lordship made the following observations:

> The General Orders do not provide for the time when a disciplinary action is required to be taken against any officer for a disciplinary offence. Applying the principles earlier stated that where procedure is provided by written laws then the courts should be wary of invoking common law, the delay, even if there was one, is not a ground for holding that there was a procedural unfairness.

[66] It must be borne in mind that delay *per se* is not necessarily conclusive of an intention to condone because it may be explained away. In any event, what is a reasonable time must vary according to the circumstances of each case.

[67] Delay *per se* can never be a ground for holding that the disciplinary proceedings conducted pursuant to O. 26 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 against the plaintiff should be held null and void and that the decision arrived thereat be set aside.

[68] Here, it was not denied that the plaintiff was never charged nor tried nor found guilty by any court of law. The issue of *prima facie* charges merely relate to "*prima facie*" in the disciplinary proceedings and not in a court of law. There was no evidence that the plaintiff was forgiven for his misconduct.

[69] What is now left for me to do is to make all those orders as made by my learned brother Low Hop Bing, JCA. I now make those orders accordingly.